IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

MEREDITH	CORPORATION,)	
)	No. 4:04-cv-00623-REL-RAW
	Plaintiff,)	
)	RULINGS ON DEFENDANT'S
vs.)	MOTION TO SET ASIDE
)	DEFAULT AND PLAINTIFF'S
KEVIN P.	O'BRIEN,)	MOTION FOR DEFAULT
)	JUDGMENT
	Defendant.)	

Defendant Kevin P. O'Brien has filed a motion to set aside the default entered by the Clerk on December 30, 2004 (#19). Plaintiff Meredith Corporation (Meredith) resists and has filed a motion for default judgment (#18). O'Brien's motion to set aside the default is before the undersigned pursuant to LR 72.1(c)(10). It is determined on the motion papers. LR 7.1(c). For good cause shown the Court finds the entry of default should be set aside. Fed. R. Civ. P. 55(c). As a consequence, the motion for default judgment will be denied as moot.¹

I.

Mr. O'Brien was employed by Meredith as the President of its Broadcasting Group under a November 9, 2001 written employment agreement. Meredith alleges that on October 28, 2004 O'Brien was

¹Meredith asks that its motion for default judgment be determined first because it was filed first. However, it is inappropriate to enter judgment on the default until it is determined whether O'Brien should receive relief from the default.

terminated for allegedly conducting himself in a manner detrimental to Meredith. In a press release of the same day Meredith said it terminated O'Brien "for violations of Meredith's Equal Employment Opportunity policies." (Def. Motion to Set Aside, Ex. 1). O'Brien challenged the decision, claiming that his termination was without cause in which case he would be entitled to a substantial amount of additional compensation. He also demanded an opportunity to cure the asserted basis for his termination afforded under a provision of the employment agreement.

In light of the developing employment dispute, Meredith, on November 12, 2004 filed a Complaint for Declaratory Judgment seeking a decree that it acted in accordance with the terms of the agreement in terminating O'Brien for cause, and has met all of its obligations under the terms of the agreement with respect to any compensation and benefits due O'Brien. The summons was served personally on O'Brien in San Francisco on November 30, 2004. It required O'Brien to answer by December 20, 2004.

Mr. O'Brien retained the services of San Francisco attorney James Wagstaffe. On December 20 Mr. Wagstaffe contacted the office of Meredith's attorney, L. Traywick Duffie, and left a message seeking an approximate month long extension of time for O'Brien to respond to the Complaint. Mr. Wagstaffe followed with a proposed stipulation which he sent by facsimile to Mr. Duffie on December 20, and attempted to call Mr. Duffie again. Mr. Duffie

was out of the office but early in the evening of December 20 the two were able to speak.

Mr. Wagstaffe was apparently laboring under a mistaken belief that his client's response to the Complaint was due December 22. In any event, he told Mr. Duffie that was the date. Mr. Duffie told Mr. Wagstaffe he did not anticipate there would be a problem with the requested extension, and said he would get back to Wagstaffe. Mr. Duffie then checked the Court's electronic docket and confirmed what he suspected, that the time to answer ran on December 20.

On December 21, 2004 Mr. Duffie faxed a letter and a proposed stipulation to Mr. Wagstaffe extending the time to answer to January 19, 2005. Mr. Duffie wrote that O'Brien was already in default, but said his client would be willing to grant the extension under certain conditions set out in the accompanying proposed stipulation. These were that O'Brien agreed not to file a Fed. R. Civ. P. 12(b) motion or to raise any defense challenging whether Meredith's claim was properly before the Court, including jurisdiction, venue, ripeness, or any "case or controversy"

²Meredith describes this as a "misrepresentation" on Mr. Wagstaffe's part. The Court doubts that is the case. Mr. O'Brien's recollection was that he was served on December 2, 2004 and he probably gave that date to Mr. Wagstaffe. (Def. Pro Se App. for Enlargement of Time; O'Brien Decl. at 1). Most people don't misrepresent a verifiable fact to a person they know will have the true information. Indeed Mr. Duffie suspected, and promptly verified, that Mr. Wagstaffe was wrong on the date.

argument. The stipulation also provided that the parties agreed all pleadings, discovery and other papers would be filed under seal.

There then followed e-mail exchanges between Mr. Wagstaffe and Mr. Duffie concerning Meredith's conditions for an agreed extension of time. They were unable to come to terms. At 4:12 p.m. on December 24, 2004, Mr. Duffie e-mailed a communication to Mr. Wagstaffe with a revised proposed stipulation which attempted to address an issue raised by Wagstaffe about purporting to waive subject matter jurisdiction. Mr. Duffie concluded by saying that unless he heard from Mr. Wagstaffe by noon Pacific Time on December 27 his client would begin initiating the default process.

When on December 21, 2004, Mr. Wagstaffe received Meredith's conditions for an extension of time Mr. Wagstaffe's office began making preparations to have Mr. O'Brien submit a pro se application for extension of time to respond to the Complaint. At the time Mr. O'Brien was in Georgia. Mr. Wagstaffe's office drafted an application, supporting declaration and proposed order and sent them by express service to O'Brien in Georgia. They were not received on December 23 whereupon Mr. Wagstaffe's office then e-mailed the papers. The documents were dated December 23, signed by Mr. O'Brien, and sent on to the Clerk. The following Monday, December 27, 2004, the application and

accompanying papers were received by the Clerk. They were marked received at 10:11 a.m. that date.

When Mr. Duffie did not hear from Mr. Wagstaffe by the December 27 deadline Duffie took steps through local counsel to file a motion for entry of default. The motion was electronically filed at 3:59 p.m. on December 27.3 The Court treats paper filings as filed when received in the Clerk's office, accordingly O'Brien's application for extension of time and accompanying papers were filed before the motion for entry of default, even though the former was not shown on the docket.

At the time it filed its default motion Meredith could not have known from the electronic docket that O'Brien had filed an application for extension of time. Our Court was and is in the process of implementing the federal courts' new "CM/ECF" electronic filing system. This effort has necessitated the reallocation of duties in the Clerk's office in order to perform the extensive quality control function required by the system. At the same time the Clerk's staff has been reduced. The learning curve under these circumstances has resulted in occasional delays in scanning paper-filed documents into the electronic system. That is what happened

³O'Brien states the docket does not indicate the time of day the motion for default was filed. The time of electronic filing of a document can be determined by clicking on the "silver ball" beside the docket entry number on the electronic docket. Doing so brings up the Notice of Electronic Filing (NEF) with accompanying transaction information including the time of filing.

in the case of Mr. O'Brien's application for extension of time. Though received and "filed" on December 27, it was not scanned and entered on the electronic docket until 3:14 p.m. on December 30, 2004. Even then, Meredith would not have known the application was filed because it was captioned an "ex parte" application which means it was treated as a private entry not to be shown on the public docket.⁴

In the meantime, Mr. O'Brien had retained counsel in Iowa. At 4:17 p.m. on December 30 attorney Mark L. Zaiger electronically filed a motion for extension of time for Mr. O'Brien to respond to the Complaint. The motion came too late to stop the train, however, for the Clerk had already granted the motion for entry of default and entered default against O'Brien at 1:44 p.m. on December 30.

On January 3, 2005 the Court, noting the entry of default, denied O'Brien's motion for extension of time to answer without prejudice. The present motion to set aside default entry followed on January 13, 2005.

⁴The application should not have been submitted ex parte. In fact it was not submitted on a truly ex parte basis because Mr. O'Brien served the application and accompanying papers by mail on Mr. Duffie and other counsel of record. Evidently the service copy was not received prior to the filing of Meredith's motion for entry of default.

An entry of default may be set aside "for good cause shown." Fed. R. Civ. P. 55(c). Relief from entry of a default requires a lesser showing than relief from a default judgment.

Johnson v. Dayton Elec. Mfg. Co., 140 F.3d 781, 783 (8th Cir. 1998). That is because

. . . [t]here is a "judicial preference for adjudication on the merits," and it is likely that a party who promptly attacks an entry of default, rather than waiting for grant of a default judgment, was guilty of an oversight and wishes to defend the case on the merits.

Id. at 784 (quoting Oberstar v. F.D.I.C., 987 F.2d 494, 504 (8th Cir. 1993)). Default judgments are not favored in the law, <u>In re Jones Truck Lines</u>, 63 F.3d 685, 688 (8th Cir. 1995), and "should be a 'rare judicial act.'" <u>Comiskey v. JFTJ Corp.</u>, 989 F.2d 1007, 1009 (8th Cir. 1993) (quoting <u>Edgar v. Slaughter</u>, 548 F.2d 770, 773 (8th Cir. 1977)).

The Eighth Circuit has instructed courts should look at a number of factors in deciding if good cause has been shown for relief from entry of a default, including: "whether the conduct of the defaulting party was blameworthy or culpable, whether the defaulting party has a meritorious defense, and whether the other party would be prejudiced if the default were excused." Johnson, 140 F.3d at 784. See Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 395 (1993); Union Pacific R.R. v. Progress Rail Servs. Corp., 256 F.3d 781, 782-83 (8th Cir. 2001);

United States ex rel. Shaver v. Lucas Western Corp., 237 F.3d 932,
933 (8th Cir. 2001). "The inquiry is essentially an equitable one,
. . . requir[ing] . . . a careful balancing of multiple
considerations . . . " Union Pacific, 256 F.3d at 782.

The first factor, and the one on which the Eighth Circuit has focused "heavily", is the blameworthiness or culpability of the defaulting party. Johnson, 140 F.3d at 784. Generally, "marginal failures" are held not sufficiently blameworthy, but "contumacious or intentional delay or disregard for deadlines and procedural rules" are. Id. In this regard the Eighth Circuit has taken its lead from the U.S. Supreme Court. Concerning the stricter "excusable neglect" standard of Fed. R. Civ. P. 60(b)(1) (which usually must be met to set aside a default judgment), the Supreme Court has said "neglect" necessarily includes negligent conduct. Pioneer Inv., 507 U.S. at 394; see Fed. R. Civ. P. 55(c) (default judgment may be "set . . . aside in accordance with Rule 60(b)). Accordingly, relief from a default may be had in "situations in which the failure to comply with a filing deadline is attributable to negligence." Pioneer Inv., 507 U.S. at 394. It is a question of degree.

In the Court's judgment Mr. O'Brien's failure to file an answer or his application for extension of $time^5$ by the deadline

 $^{^5}$ In the declaration that accompanied the pro se application for extension of time Mr. O'Brien said he intended to defend the (continued...)

specified in the summons was at most a marginal failure, and a low order one at that. The present predicament could have been avoided. Mr. Wagstaffe contacted Mr. Duffie to request an extension of time on the last day before his client was in default which means that either Mr. O'Brien retained Mr. Wagstaffe late in the day, or Mr. Wagstaffe did not act until the last moment. The time to move or plead could and should have been verified. Steps might have been taken to file the application for extension of time immediately, though it is difficult to fault Mr. Wagstaffe's attempt to confer with Meredith's counsel and obtain agreement. See LR 7.1(k). Iowa counsel, necessary in any event to comply with the associate counsel requirement of LR 83.2(d)(3), was evidently not brought in until December 28, 2004. (Def. Motion for Enlargement of Time at 1). With time a critical factor, O'Brien could have requested permission to file his application by facsimile as contemplated by LR 5.1(c).6

None of these things though, if they amount to neglect, are remotely close to the kind of intentional delay or disregard

⁵(...continued) lawsuit. The Court would not have considered Mr. O'Brien in default had his application been filed within the summons period. <u>See</u> Fed. R. Civ. P. 6(b).

⁶Mr. Wagstaffe contacted the Clerk's office in this regard and was told the Court would not accept facsimile filings, but it is a good idea in any federal court to review the local rules. The cited rule allows for facsimile filings in emergency situations with the Court's permission.

for deadlines that will hold a defaulting party blameworthy or culpable. They have about them the unmistakable patina of 20/20 hindsight. The fact is, Mr. O'Brien intended to defend the action, obtained counsel, sought an extension of time to respond to the Complaint and, through Mr. Wagstaffe, negotiated with Meredith's counsel to seek Meredith's agreement. In the face of the conditions demanded by Meredith, Mr. Wagstaffe took reasonably prompt steps to assist Mr. O'Brien in securing an extension of time from the Court.

Meredith has known all along that Mr. O'Brien intends to litigate, as evidenced by his post-termination e-mails to Meredith Vice President for Human Resources Scott Rundall (Pltf. Resp. in Opposition, Ex. B), and the communications between Mr. Wagstaffe and Mr. Duffie. There is no question that Mr. O'Brien's request for an extension of time to respond to the Complaint was a reasonable one. There has been no real failure to defend on Mr. O'Brien's part.

The existence of a meritorious defense is a closer question on this record. Top Meredith management received a letter from the general manager of one of Meredith's broadcast facilities in Atlanta, Georgia. The manager was about to be terminated. The letter contained allegations about comments and conduct by Mr. O'Brien toward employees which Meredith felt could have potential legal consequences for the company and violated its EEO policies.

Under the direction of Meredith's general counsel, an investigation was conducted by two Atlanta-based attorneys who specialized in employment law. The results of their investigation corroborated many of the allegations against Mr. O'Brien. A summary of the investigation is attached to Meredith's motion papers as Exhibit C. In arguing a meritorious defense Mr. O'Brien does not dispute the findings summarized by Meredith's general counsel, except to make a conclusory denial. The Court has reviewed the summary and is frank to say that, unrebutted, it is difficult to quarrel with the judgment of Meredith's Board of Directors that the conduct described warranted dismissal for cause.

Mr. O'Brien's articulated defense, however, goes not to the underlying facts but to the interpretation of his contract with Meredith. O'Brien says that the "for cause" discharge provision in the contract can be interpreted in different ways, though he does not set out the variant interpretations. He also says he requested an opportunity to "cure" the alleged deficiencies in his conduct under the contract provision that gave him an opportunity to remain employed "if the basis of [the] termination is susceptible to being cured" and a cure is made. (Complaint Ex. A, \P 6(c)). O'Brien was not given an opportunity to cure. Arguably the EEO policy violations attributed to him, which had to do with his behavior toward employees, were curable by reprimand, apology, training, counseling, and/or other specific remedial measures.

The existence of a meritorious defense is determined by examining whether the evidence "would permit a finding for the defaulting party." <u>Johnson</u>, 140 F.3d at 785 (citing <u>Augusta</u> Fiberglass Coatings, Inc. v. Fodor Contracting Corp., 843 F.2d 808, 812 (4th Cir. 1988)). "The underlying concern is . . . whether there is some possibility that the outcome . . . after a full trial will be contrary to the result achieved by the default." Augusta Fiberglass, 843 F.2d at 812 (quoting 10 C. Wright, A. Miller, M. Kane, Federal Practice and Procedure § 2697 at 531 (2d ed. 1983)). The agreement can be interpreted as affording Mr. O'Brien an opportunity to correct the conduct in question. If he was entitled to, but not given, an opportunity to cure, the factfinder might conclude the Meredith Board of Directors did not act in accordance with the terms of the agreement in discharging O'Brien, a complete defense to the declaratory judgment sought. The facts disclosed in the motion papers thus would permit a finding for Mr. O'Brien.

The final factor discussed by the parties, prejudice to Meredith if the default is excused, favors O'Brien. Citing Widmer-Baum v. Chandler-Halford, 162 F.R.D. 545, 556 (N.D. Iowa 1995), Meredith appears to argue that relief from the default would disappoint its expectations concerning the integrity of the court system and the enforcement of reasonable deadlines. The Eighth Circuit has expressly rejected this rationale for finding

prejudice. <u>Johnson</u>, 140 F.3d at 785. Meredith also asserts prejudice from the delay, but it was willing to grant, subject to its conditions, an extension until January 19, 2005 to answer. The additional delay occasioned by the proceedings to set aside the default will be minimal and not prejudicial. Prejudice cannot be found from delay alone. <u>Id.</u>

III.

The blameworthiness and prejudice factors strongly favor granting relief from the default, the meritorious defense factor, less so. The Court is required to consider and balance all of the relevant considerations and having done so is firmly convinced that the entry of default should be set aside. Accordingly, for good cause shown defendant's motion to set aside default is granted. Plaintiff's motion for default judgment is denied as moot. Plaintiff's alternative request that defendant be found to have waived defenses under Fed. R. Civ. P. 12, including on the basis of improper venue and lack of personal jurisdiction, is denied without prejudice. Defendant may or may not raise these defenses. The Court will not determine they have been waived on an anticipatory basis.

Defendant may have to and including **February 25, 2005** to move or plead in response to the Complaint.

IT IS SO ORDERED.

Dated this 10th day of February, 2005.

ROSS A. WALTERS

CHIEF UNITED STATES MAGISTRATE JUDGE